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April 15, 1999

BY HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Re: Notice of Ex Parte Communication Regarding Interconnection
and Resale Obligations Pertaining to Commercial Mobile
Radio Services, CC Docket No. 94-54**

Dear Ms. Salas:

Yesterday, on behalf of the Telecommunications Resellers Association ("TRA"), the undersigned of Hogan and Hartson L.L.P. and David Gusky, Executive Vice President, TRA, met with Dan Connors, legal advisor to Commissioner Susan Ness, regarding the referenced proceeding.

In the meeting, TRA discussed its position regarding the importance of unrestricted wireless resale to a competitive wireless and full service market. TRA also discussed the importance of Commission enforcement of the current resale obligation and the need to eliminate any sunset of the resale requirement. TRA also discussed its opposition to proposals to eliminate the resale requirement on a market-by-market basis.

The attached handouts were distributed and discussed at the meeting. TRA also discussed the points made in the November 13, 1998, letter to Chairman William Kennard from David Gusky of TRA filed in the referenced docket.

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Magalie R. Salas

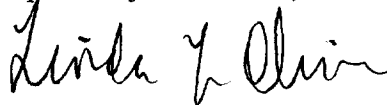
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I have hereby submitted two copies of this notice for each of the referenced proceedings to the Secretary, as required by the Commission's rules. Please return a date-stamped copy of the enclosed (copy provided).

Please contact the undersigned if you have any questions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Linda L. Oliver". The signature is fluid and cursive, with the first name "Linda" being more prominent.

Linda L. Oliver
Counsel for Telecommunications
Resellers Association

Enclosure

cc: Dan Connors

Telecommunications Resellers Association
Summary of Position on Wireless Resale Reconsideration Issues

Wireless Resale Sunset

- The wireless resale sunset is based on faulty predictions about behavior of CMRS providers and should be eliminated.
- Before allowing a sunset to take place, the Commission must re-examine the wireless market.
- The Commission should protect resellers' customers from losing service when the resale rule sunsets.

Barriers to Resale

- Commission policy forbids indirect as well as direct restrictions on resale.
- The Commission should clarify that a refusal to offer a resale agreement constitutes a restriction on resale.
- The Commission should clarify that refusal to provide resellers with electronic billing tapes constitutes a restriction on resale.

Enforcement of the Resale Requirement

- The existing pattern of noncompliance with the resale requirement warrants vigorous FCC enforcement.
- The Commission should declare that rocket docket procedures will apply to complaints from wireless resellers.

Resale of Wireless/CPE Bundles

- Resale of bundled offerings of wireless service and equipment must remain unrestricted.
 - Wireless service is effectively discounted through below-cost pricing of equipment sold in packages.
-

Key Points to Address in Reconsideration Order on Wireless Resale

CC Docket No. 94-54

Telecommunications Resellers Association

April 1999

ACCESS TO COMPUTERIZED BILLING INFORMATION

Failure to provide reseller customers computerized (electronic) billing information constitutes an indirect restriction on resale, if the carrier has the capability to provide such information.

Denial of access to computerized billing information also is unreasonably discriminatory if that information is provided in a computerized or electronic format to any of the carrier's end user customers. 1/

The provision of computerized (electronic) billing information by a carrier to a reseller is a critical component of a resale business.

- Access to computerized billing information permits a reseller to utilize its own computer capabilities to cost-effectively produce individual bills for its thousands of retail subscribers.
- If a carrier provides only "paper" bills for a reseller's use of the carrier's airtime, the reseller would be forced to *manually* enter into its billing system the airtime usage of each of its customers in order to produce subscriber-specific invoices. This process simply is not realistic in terms of cost, efficiency, likelihood of error, and time.

As a practical matter, faced with the prospect of using only carrier-provided paper bills, a reseller could not, as a practical matter, resell the services of that particular carrier.

1/ Resellers would compensate carriers for any costs associated with producing the electronic billing information.

USE OF THE ROCKET DOCKET FOR WIRELESS RESALE COMPLAINTS

The FCC's accelerated docket ("rocket docket") procedures are well-suited to resolving complaints that a carrier is denying service to a requesting wireless reseller customer. 2/

Wireless resale complaints generally would satisfy the Commission's criteria for rocket docket consideration:

- Involvement of FCC staff is likely to produce resolution of the dispute.
- Expedited resolution of the dispute would advance competition in the wireless market.
- The issues presented would be suited for decision under the constraints imposed by accelerated docket procedures.
- Complaints would not be likely to raise threshold questions leading to a motion to dismiss.
- If a wireless reseller seeks accelerated docket treatment, it is not likely that a disparity in resources will harm its ability to prosecute its complaint. 3/

2/ Implementation of the Telecommunications Act of 1996 Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers, CC Docket No. 96-238, Second Report & Order, FCC 98-154, rel. July 14, 1998 ("Accelerated Docket Order"). Nothing in the Commission's accelerated docket procedures would preclude use of those procedures to resolve complaints against wireless common carriers.

3/ Accelerated Docket Order at ¶¶ 16-22. Of course, some complaints filed by wireless resellers might not have all the characteristics necessary for accelerated docket treatment. But the widespread refusal of many PCS and SMRS carriers to permit resale should mean that a number of wireless resale complaints would satisfy these criteria, and that use of rocket docket procedures would lead to quick resolution of those complaints.

TRA's member surveys show that many (if not most) PCS and SMRS carriers still refuse to permit unrestricted wireless resale. 4/

The availability of rocket docket procedures would be an effective and resource-limited means to produce industry compliance with the wireless resale rule.

The Commission's use of rocket docket procedures has been effective in obtaining industry-wide compliance with FCC rules.

For example, the FCC relied on the availability of rocket docket procedures to help ensure that incumbent local exchange carriers would continue to fulfill their interconnection agreement obligations during the pendency of the FCC's Supreme Court remand proceeding on network elements. 5/

4/ See Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services, WT Docket No. 98-100 *et al.*, FCC 98-134, released July 2, 1998, at ¶ 38 and n.114 ("[T]he record contains significant evidence suggesting that despite the current resale rule, abuses in the form of refusals to offer services for resale still exist," citing, *inter alia*, TRA's July 1997 Survey). See also February 10, 1998, Letter from Ernest B. Kelly, III, President, TRA, to Chairman William E. Kennard, FCC, attaching 1997 TRA Year End Survey of Wireless Resellers.

5/ See "Common Carrier Bureau Establishes Rapid Response System to Minimize Disputes Arising From Supreme Court's *Iowa Utilities Board* Order, Public Notice, DA 99-532, rel. March 17, 1999.

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**Why Resale of Bundled Offerings of
CPE and Wireless Service
Must Remain Unrestricted**

The Commission correctly held in the CMRS Resale Order that carriers should not be allowed to circumvent the resale requirement by denying resellers the ability to resell a package of wireless service and equipment. 1/

Under the resale rule, 47 C.F.R. § 20.12(b), resellers are entitled to “unrestricted resale” of any CMRS service, including services that are discounted through bundled offerings.

In its 1992 order creating a wireless exception to its general prohibition on bundling of basic service and CPE, the FCC noted that resale of bundled offerings could not be restricted. 2/

1/ Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, FCC 96-263, released July 12, 1996, at ¶ 31, 11 FCC Rcd 18455 (1996).

2/ Bundling of Cellular Customer Premises Equipment and Cellular Service, CC Docket No. 91-34, 7 FCC Rcd 4028, 4032 n.48 (1992) (“Any restrictions on resellers’ ability to buy packages of CPE and service on the same basis as other customer[s] would be unlawful.”)

Denying reseller customers the ability to purchase a bundled offering constitutes

- the denial of a reasonable request for service in violation of Section 201(b) and
- discrimination against reseller customers in violation of Section 202(a). 47 U.S.C. §§ 201(b), 202(a).

Communications services increasingly are being sold in bundle-priced packages with other products, some of which may not themselves be subject to Title II. 3/

Standard practice in the wireless industry is to sell wireless phones at deeply discounted rates when the phones are purchased with wireless service. 4/

- This practice, while permitted under FCC rules for wireless services, enables the carrier effectively to discount the *service* when it is sold in a bundle with equipment.
- The bundled price *disguises* the discounting of the service price.

3/ See, e.g., “Bundling Still a Mixed Bag,” RCR, Jan. 18, 1999. Bundled pricing is commonly defined as offering of two or more products at a packaged rate that is lower than the price that would be paid if the components were purchased separately. See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket Nos. 96-61, 98-163, FCC 98-258, released October 9, 1998, at ¶ 1.

4/ Except in the case of wireless services, it is still unlawful to bundle telecommunications services with equipment. The Commission is considering whether to eliminate the general prohibition on bundling of common carrier services with CPE and enhanced services. See id.

This discounted wireless service should be available for resale, through *resale of the bundle*.

Or, if the carrier prefers, the discounted service can be provided by offering resellers service (without CPE) *at the effective discount* reflected in the bundled offering.

The fact that CPE standing alone is not a Title II offering, or that CPE is competitive, is irrelevant to whether the bundle should be available to resellers.

- In the CMRS Resale Order, the Commission did *not* hold that the non-common carrier products themselves must be available for resale.
- Resellers are like any other customer, and cannot lawfully be denied the ability to purchase service, whether it is offered on a stand-alone basis or bundled with CPE.
- Carriers cannot use bundling as an excuse to discriminate against resellers.

The fact that a reseller may be able to purchase the CPE from another source also is irrelevant to the requirement to permit resale of the bundle.

- The problem with bundling is not the lack of availability of CPE.
- Rather, the issue is that wireless service is being effectively discounted through the bundle, and that service discount is not available to reseller customers.

The Commission did not prohibit bundling of wireless service with CPE; it only required carriers to refrain from denying resellers the ability to purchase bundled as well as stand-alone service offerings.

The Commission simply was recognizing that when a Title II common carrier service is bundled with a non-Title II offering, carriers can employ the bundled pricing as a means of denying to resellers the most favorable retail rate.

The implications of eliminating the requirement that bundles be made available for resale would be profound.

Full service packages are likely to become the rule in the marketplace.

- By definition, the components of the package will be more expensive, standing alone, than they will be when purchased as a bundle.
- Thus, the lowest effective rates for service will be those available in bundled offerings.
- If those bundles are not available for resale, resellers will be left with the ability only to resell the highest priced, least discounted offerings.

If resale becomes nonviable as a practical matter, then only those service providers that own networks will be in a position to compete in a full service world.